

The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

MAILED

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U.S. PATENT AND TRADEMARK OFFICE
BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte CARL E. WHITCOMB

Appeal No. 2005-2481
Application No. 10/075,096

ON BRIEF

Before GARRIS, WALTZ, and TIMM, Administrative Patent Judges.

GARRIS, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on an appeal which involves claims 1-65.

The subject matter on appeal relates to a root growth barrier. With reference to the appellant's drawing, the root growth barrier 12 comprises a layer of a root-tip-trapping material 18 bonded to a layer of a root-impenetrable material 16. The root-tip-trapping material may be a porous fabric made of polyester, polypropylene or cotton.

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This appealed subject matter is adequately represented by independent claims 1 and 49 which read as follows:

1. A root growth barrier, comprising a layer of a root-tip-trapping material bonded to a layer of a root-impenetrable material.

49. A root growth barrier, comprising:
a polymer sheet having a surface bonded to a porous fabric.

The references set forth below are relied upon by the examiner in the § 102 and § 103 rejections before us.

Thomas	5,311,700	May 17, 1994
Flasch, Jr. (Flasch)	5,852,896	Dec. 29, 1998
Kalpin	3,094,810	Jun. 25, 1963
Reiger	6,202,348	Mar. 20, 2001
		(Filed Jun. 22, 1998)
Billings	6,223,466	May 01, 2001
		(Filed Oct. 08, 1999)
Berlit et al. (Berlit).	GB 2,073,576	Oct. 21, 1981
Van der Goorbergh	EP 300578	Jan. 25, 1989

Claims 1, 2, 4, 13-16, 18, 19, 29, 30, 41, 46, 48, 49, 53 and 63 are rejected under 35 U.S.C. § 102(b) as being anticipated by Berlit.

Under 35 U.S.C. § 103(a), the remaining claims on appeal are rejected as being unpatentable over Berlit alone or in various combinations with the other applied references listed above.

We refer to the brief and reply brief and to the answer (as well as the final action mailed January 14, 2004 which is alluded to on page 3 of the answer) for a complete exposition of the opposing viewpoints expressed by the appellant and by the examiner concerning the above noted rejections.

OPINION

For the reasons expressed below, we cannot sustain any of the rejections advanced by the examiner on this appeal.

The examiner's § 102 rejection cannot be sustained because it is based upon erroneous findings of fact. Specifically, it is the examiner's finding that Berlit discloses "a root growth barrier comprising a layer of a root-tip-trapping material 11, 14" (Final Office action, page 2) and that Berlit further discloses "the root-tip-trapping material being polypropylene which is a porous fabric" (id). However, the Berlit reference contains no express teaching that layer 11 or layer 14 is formed of a "root-tip-trapping material" (e.g., claim 1) or a "porous fabric" (e.g., claim 49).

It is true that Berlit's layers 11 and 12 can be formed of certain polymers including polypropylene (e.g., see the paragraph bridging pages 1 and 2 of the Berlit reference). Apparently, the examiner believes the polypropylene layer taught by Berlit is tantamount to a root-tip-trapping material and a porous fabric because the here claimed root-tip-trapping material may be in the form of a porous fabric made of certain materials including

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polypropylene (e.g., see the paragraph bridging pages 3 and 4 of the answer). The examiner's belief is meritless.

There is absolutely no basis for considering the polypropylene layer disclosed by Berlit as a porous fabric. Based on the reference disclosure, this layer need not be either a porous material or a fabric material. It could, for example, be in the form of a nonporous polypropylene film. Analogously, no basis exists for considering Berlit's polypropylene layer as possessing the root-tip-trapping capability claimed by the appellant.

For the above stated reasons, we cannot sustain the examiner's § 102 rejections of claims 1, 2, 4, 13-16, 18, 19, 29, 30, 41, 46, 48, 49, 53 and 63 as being anticipated by Berlit.

The examiner has not attempted to cure the above discussed deficiency of Berlit in any of the § 103 rejections before us. Under these circumstances, we also cannot sustain any of the examiner's § 103 rejections.

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The decision of the examiner is reversed.

REVERSED

BRADLEY R. GARRIS
Administrative Patent Judge

THOMAS A. WALTZ
Administrative Patent Judge

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CATHERINE TIMM
Administrative Patent Judge

BRG/vsh

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